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## Senate

### Statement of Senator Dianne Feinstein

#### *"Nuclear Option"*

Mrs. FEINSTEIN: Mr. President, I come to the floor to make a plea to my colleagues and my friends on both sides of the aisle. I have spoken on this issue twice. But within 24 hours, the time will come when the Senate may well be changed. Right now is the time to let political pressures cool, to step back from the brink and to reflect on the long-term consequences rather than the short-term gain. The time has come to walk away from a decision that will turn our governmental system on its head.

The reason this is called the nuclear option is not necessarily what it would do to the body but what it does to our ability to control the rules of the body. Because for the first time in history, a rule will be changed or, as we on this side of the aisle say, broken, by a majority vote, 51 votes, a majority of the Senate, when in fact rule changes require a two-thirds majority vote. There is virtually no rule that I know of in this body that can be changed with 51 votes.

I understand that it is going to be done without consultation of the Parliamentarian. My understanding is that he would say it is not within the Senate rules or precedent to change this rule with only 51 votes. Nonetheless, it is going to be done.

When taken to its logical conclusion, a majority vote in favor of the nuclear option will fundamentally alter our democracy, not only by breaking the rules as I just described but by altering the fundamental balance between this body and the other House and, most particularly, the

role that Senators have had representing their constituents for over 200 years.

I recognize we may not agree on the qualifications of the nominees before us. I recognize many of my friends on the other side of the aisle feel very strongly about confirming these candidates to the court. But in the end, regardless of who is right and who is wrong, changing the Senate's rules, throwing out precedent, will profoundly harm this body, the comity we enjoy, the moderation that has defined the Senate, the bipartisanship that is essential, and the balance of power that is needed to maintain any form of a democratic government, particularly this one.

This nuclear option changes the deliberative nature of this body because it, in effect, ipso facto changes the Senate into the House of Representatives so that the Senate will work its will by majority. That has never necessarily been the case before. We all know the Senate is like a huge bicycle wheel. When one of the 100 spokes is out of line, it stops the wheel. So everybody respects that and pulls back from the brink because of it because we know if we are the one that puts on the hold or stops the wheel from turning, that we also can feel that happen to us with our legislation and our bills.

Former Republican Senator Warren Rudman, whom I greatly respect -- he represented New Hampshire from 1980 to 1993 -- was quoted in the press this weekend. Let me share with you what he said:

I will lament this vote if it succeeds. People tend to look at the history of the Senate and how it functions, and my bottom line is that the Founding Fathers wanted a true balance of power and this would shift the balance of power to the White House. My sense is, thinking back on it, that I don't think you could have gotten 51 votes on this sort of thing in the past...I would have clearly voted against it.

That was Warren Rudman this past weekend.

I urge my colleagues on the other side of the aisle to stand up against the political tidal wave pushing this agenda and let the passions of the moment cool. The debate last week was overwhelmed with fiery rhetoric and political posturing. One Republican compared Democrats to Adolf Hitler. Another Senator insinuated that Democratic opposition is based on a nominee's religious faith. Others twisted the history of judicial nominations beyond recognition. And to be fair, some Senators on our side of the aisle also employed fiery language.

Just listening to this debate, we can see what will happen if the majority goes forward on this path. The Senate will most certainly face a loss of civility, a loss of respect for differences. Political message will overwhelm substantive policy, and political potshots will drive our debates rather than the best interests of the American people. Playing to the base rather than playing out the real-

life consequences of our acts will rule the day.

Regardless of each of our opinions on whether each nominee before the Senate should be appointed to the appellate courts, the aftermath of the nuclear option will not serve the American people well.

On two prior occasions, I have come to the floor to talk about the importance of checks and balances, the intentions of our Founding Fathers, the structure of the Constitution, and the inherent benefits of conflict and compromise. Our forefathers knew, as do our modern counterparts, that essential to a true democracy is the need for a balance of power because who is in the minority has, and will, constantly change. Democrats held the House majority for over 50 years, and now Republicans have been in the majority for over a decade. Democrats held the White House for 8 years. Now Republicans will have occupied the White House for 8 years. The swing back and forth between the majority and the minority applies not just to political parties but to populations and ideas as well. Populations change and the political pendulum swings, but what moderates those swings and the tidal wave of power is the role and influence of the minority.

While it is true many of us on this side of the aisle were frustrated when Republicans used their rights and the Senate rules to block Clinton's judges and our legislative agenda, we aired our frustration. At that time, I urged my colleagues to allow a vote. However, I did not advocate breaking the rules with 51 votes and employing the nuclear option as a way to force Republicans to their knees. The role of moderation has worked and has been an important balance in our country.

As my colleague, Senator Lieberman, said last week:

In a Senate that is increasingly partisan and polarized and, therefore, unproductive, the institutional requirement for 60 votes is one of the last best hopes for bipartisanship and moderation.

For example, President Clinton understood the strong feelings of our Republican colleagues on judges, and he went to extensive efforts to consult Republicans on judges that would be nominated. In describing these efforts, Senator Hatch wrote in his book that he "had several opportunities to talk privately with President Clinton about a variety of issues, especially judicial nominations."

Senator Hatch described how when the first Supreme Court vacancy arose in 1993, "it was not a surprise when the President called to talk about the appointment and what he was thinking of doing." He went on to describe that the President was thinking of nominating someone who would require a "tough political battle." Senator Hatch recalled that he advised President Clinton to consider other candidates and suggested then-DC Circuit Judge Ruth Bader Ginsburg, as well as then-First Circuit Judge Stephen Breyer.

So there was a defined, informal consultation that showed the power and authority of the Republican chairman of the Judiciary Committee, who actually submitted to the President -- at that time Bill Clinton -- the names of Ruth Bader Ginsburg and Stephen Breyer for appointment to the Supreme Court. However, today there is not really active consultation by this administration in most cases. Instead, there appears to be a kind of disregard for the opinions of all Democratic Senators, even home State Senators. I know my colleagues from Michigan have been extremely frustrated in their efforts to find a solution to the stalemate over the Sixth Circuit.

I am also concerned that if the nuclear option moves forward, there will no longer really be a need for the Judiciary Committee. I ask my colleagues to think about this. If the President is to be given unlimited power to appoint whomever he chooses, there will be no need for hearings, there will be no need for an examination of a nominee's record. Any dissent or concerns will fall on deaf ears, so long as there are at least 50 Senators willing to confirm the

President's choices for the Federal bench.

Checks and balances are not new. Our country's 200-year tradition of working through our differences is not new. The need for consultation is not new. The important role of the Judiciary Committee -- and I have served as a member for 12 years now -- in examining a nominee's qualifications, is not new. What is new is the majority party's decision that if you win an election, you should have absolute power.

Earlier this week, the Senator from Pennsylvania, Mr. Santorum, stated:

I guess elections do not matter. I guess who people vote for for President is of no concern to the minority in the Senate... If someone happens to be reported out and a majority defeats, fine, majority rules.

It is this very sentiment that concerns me and many others because this logic ignores that the Democratic Senators won their elections, too, and that while President Bush did win the election, those who did not vote for him still maintain their rights to have their voices represented in Government. Our country is not an autocracy. It is a democracy, where the minority enjoys an active role, particularly in the Senate.

Protecting the minority and ensuring it is not overrun by a strong majority is central to the need for an independent judiciary. In fact, this is a basic lesson taught in elementary civics in schools across the country. One teacher's notes found on the Internet as a model for civic teachers states:

Purpose/Rationale/Goals of the day's lesson:

Students should understand that majority rule does not take precedence over minority rights. The lesson should promote thought, understanding, and acceptance that unpopular ideas are protected under the United States Constitution. Students should also understand that it is the independent judiciary that protects these rights.

So it is a basic lesson we all learn in school from a very early age. Federal judges are meant to be independent. That is one of the reasons why the nuclear option is so dangerous -- because it completely quells the arguments, the views, and the votes of the minority and, therefore, eases the way for absolute power to prevail with absolutely partisan appointments. There is nothing the minority can do to stop that.

I have quoted John Adams before on the specific need for an independent judiciary.

He stated in a pamphlet called "Thoughts on Government," which was distributed in 1776, the following:

"The judicial power ought to be distinct from both the legislative and the executive, and independent upon both, so that it may be a check upon both, as both should be checked upon."

Today, I also want to quote from Alexander Hamilton, who, in the Federalist Papers, No. 78, published in 1788, wrote:

As liberty can have nothing to fear from the judiciary alone, it has everything to fear from its union with either the [executive or legislative] departments.

These statements by Adams and Hamilton clearly set forth the intent of our forefathers that the judiciary should be and must be independent. The Senate was meant to play an active role in the selection process, and the judiciary was not solely to be determined by the executive branch.

As a matter of fact, I pointed out earlier on that in the early days of the Constitutional Convention, it was proposed that the Senate solely determine who would sit on the federal bench, and then that was changed to give the President a role in the nomination of judges confirmed by the President.

I have also spoken about the history of judicial nominations under the Clinton administration. As I have

explained in great detail, during the previous administration, Republicans used the practice of blue slips, or an anonymous hold, to allow a single Senator, not 41, to prevent a nomination from receiving a hearing, a markup, a cloture vote, or an up-or-down vote. This demonstrates that Senate rules have been used throughout our history by both parties to implement a strong Senate role and minority rights, even the right of one Senator to block a nominee. As has been illustrated by my colleagues on the other side of the aisle, both parties have bemoaned the impact of procedural delays on confirming judges.

However, President Clinton's nominees were pocket filibustered by as little as one Senator in secret and, therefore, provided no information about why their nomination was being blocked, let alone an opportunity to address any concerns or criticisms about their record -- no up-or-down vote, no cloture vote, no vote in the Judiciary Committee, nothing. There were 23 circuit court nominees handled this way -- filibustered by as few as 1 person, 1 Senator -- and 38 district court nominees were filibustered by as little as 1 Senator.

In addition, unlike what some have argued, this practice was implemented throughout the Clinton administration when Republicans controlled the Senate, not just in the last years or months.

The question I have posed to this body twice now -- and I do it a third time -- is whether the public interest is better served by 41 Senators taking an openly declared position, publicly debating an individual's past speeches, temperament, opinions, or a filibuster of 1 or 2 Senators in secret when one does not know why or who? I think the answer is pretty clear.

This weekend, I read the press coverage on the nuclear option with great interest. I was heartened to realize that Democrats are not the only ones who are concerned with the idea of drowning out minority views and turning the Senate into the House.

The New York Times editorialized:

The Republican attack is deeply misguided. There is a centuries-old Senate tradition that a minority can use a filibuster to block legislation or nominees. The Congressional Research Service has declared that the nuclear option would require that "one or more of the Senate's precedents be overturned or interpreted otherwise than in the past." The American people strongly oppose the nuclear option, according to recent polls, because they see it for what it is: rewriting the rules to trample the minority.

That is the New York Times.

The Associated Press reported on a new poll that asked about judges and the Senate's role. The results found that 78 percent of those polled stated that the Senate should "take an assertive role in examining each nominee." And a Time poll said 59 percent of Americans believe Republicans should not be able to eliminate the filibuster. Whereas, in sharp contrast, a poll released last Thursday by NBC News/Wall Street Journal found that only 33 percent of those surveyed approve of the job being done by the Congress. This is a monumental number. I submit that as partisanship and the polarization of this body increases, the poll numbers will continue to decrease because that is not what the American people want us to do.

In addition, there were more reports of former Republican Senators who are also concerned about the impact of a nuclear option. Former Senator Clifford Hansen, a Wyoming Republican who served from 1967 to 1978, was quoted as stating:

Being a Republican, we were the minority party, and I suspect there are some similarities between our situation then and those that the Democrats find themselves in today. I am sure that it would have concerned me if there were limits on the filibuster. When I was in the Senate, the Democrats were in control, and we made a lot of friends with the Democratic Party, and I realized then

that if I were going to get anything done, I had to reach out and establish some real friendships with members on the other side.

That is what this Democrat has tried to do over the past few years as well.

The Los Angeles Times wrote:

If a showdown over President Bush's nominees goes forward as planned next week, it would mark one more significant step in the Senate's transformation from a clubby bastion of bipartisanship into a free-wheeling political arena as raucous as the House of Representatives.

And The Economist wrote:

Amid all this uncertainty, the filibuster debate has almost certainly harmed one institution: the Senate. It was deliberately designed by the Founding Fathers to be the deliberative branch of the American Government. Senators who sit for 6 years rather than the 2 years of the populist House, have long prided themselves on their independence. The politics of partisanship has now arrived in the upper Chamber with a vengeance. The Senate has long stood as a barrier to government activism on either side.

As all these accounts acknowledge, the nuclear option will turn the Senate into a body that could have its rules broken at any time -- and this is significant -- not by 60 votes but by a majority of Senators unhappy with any position taken by the minority. It begins with judicial nominations. Next will be executive appointments, and then it will be legislation. If this is allowed to happen, if the Republican leadership insists on forcing the nuclear option, the Senate becomes the House of Representatives, where the majority rules supreme and the party in power can dominate and control the agenda with absolute power.

This country is based on a balance between majority rule and minority rights. I believe it is important to reflect on what our country is facing while this debate is moving forward.

We had another sharply divided election, where the President was elected by a slight margin. The differences in American beliefs have been highlighted through heated debate over the budget, Social Security, the war in Iraq, increased tax cuts, funding for education, health care, and law enforcement. At times, the level of disagreement can seem overwhelming. Yet, with all this tension, the majority party is attempting to implement a strategy to completely silence the minority. It is no longer acceptable to have differences. The defining theme now seems to be "my way or the highway."

Last week, I said, when 1 party rules all 3 branches, that party rules supreme, but tomorrow, if the nuclear option proceeds, the Republican party will be saying that supreme rule is not enough; total domination is what is required. The nuclear option is the majority's strategy to completely eliminate the ability of the minority to have any voice, any influence, any input. When might makes right, someone is always trampled. Instead, I believe we should be ruled by the philosophy that right makes might.

Thomas Jefferson consistently advocated for our country based on the free flow of ideas and open debate. And maybe up to this point we have taken for granted that a government of the people must be based on reason, on choice, and on open debate. But before our Nation was founded, modern governments were based on authoritarian domination. The people, in general, were considered little more than cattle to be governed and controlled by those possessing wealth, property, education, and power. The Founding Fathers introduced the revolutionary idea that government could rest on the reasoned choice of the people themselves.

In a free society, with a government based on reason, it is inevitable that there will be strong disagreements about important issues. But a government of the people requires difference of opinion in order to discover truth.

As I said at the beginning of this statement, I am deeply troubled that

legitimate disagreements over a nominee's qualifications to be elevated to a lifetime appointment have been turned into a strategy to unravel our constitutional checks and balances.

Unfortunately, while the Department of Defense authorization bill sat on the calendar for the past week, we have wasted time on a clear stalemate. There are many urgent problems the Senate needs to be focused on and Americans want us to focus on: the war in Iraq, protecting our homeland, addressing the high cost of prescription drugs, alleviating rising gas prices, ensuring our Social Security system is stable and working, and reducing the Federal deficit. I am fairly certain we will not all agree on the best means to address these issues.

I very much regret what we are in today. To give you just a small example -- and I think the Presiding Officer knows this -- I sit on three committees. These three committees, for markups of critical bills, are meeting simultaneously. They are Intelligence, marking up the Patriot Act; Judiciary, marking up the asbestos bill; and the Energy Committee, marking up the Energy bill at the same time. This is not the way to do the people's business -- constrained by time limits artificially imposed because of this present situation.

I very much agree with the sentiment expressed by my colleague, Senator Specter, when he said:

If [during the cold war] the United States and the Soviet Union could avoid nuclear confrontation... so should the United States Senate.

I hope Republicans will choose to honor the tradition of our democracy and walk away from this confrontation. I know if the shoe were on the other foot, I would not advocate breaking Senate rules and precedent.

Thank you, Mr. President. I yield the floor.